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Supreme Court, U.S.
FILED

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No.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

AARIF DAHOD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH

PETITION FOR WRIT OF CERTIORARI

BRUCE A. ZIMET, ESQUIRE
Counsel For Petitioner
One Financial Plaza
Suite 2612
Fort Lauderdale, FL 33394
(954) 764-7081

57 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the sentencing court's use of the 1993 Sentencing Guidelines to impose a sentence governed by 1987 Sentencing Guidelines violates the *ex post facto* protection of the Constitution.

2. Whether the sentencing court's dissimilar application of similar specific offense characteristics among codefendants constitutes improper disparate sentencing.

3. Whether imposition of sentence enhancements pursuant to both §2F1.1(b)(2) and §3B1.1B(b) U.S.S.G. constitutes impermissible double counting.

LIST OF ALL PARTIES TO THE PROCEEDING

1. Aarif Dahod, Petitioner
2. United States of America, Respondent

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CITATION TO DECISION IN COURT BELOW 1

BASIS FOR JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE 1

CONCISE STATEMENT OF THE CASE 2

1. Basis for Federal Jurisdiction in the Court of First Instance 4

ARGUMENT:

I. THE SENTENCING COURT'S USE OF THE 1993 SENTENCING GUIDELINES TO IMPOSE A SENTENCE GOVERNED BY 1987 SENTENCING GUIDELINES VIOLATES THE *EX POST FACTO* PROTECTION OF THE CONSTITUTION 5

II. THE SENTENCING COURT'S DISSIMILAR APPLICATION OF SIMILAR SPECIFIC OFFENSE CHARACTERISTICS AMONG CO-DEFENDANTS CONSTITUTES IMPROPER DISPARATE SENTENCING 8

III. IMPOSITION OF SENTENCE ENHANCEMENTS PURSUANT TO BOTH §2F1.1(b)(2) AND §3B1.1B(b) U.S.S.G. CONSTITUTES IMPERMISSIBLE DOUBLE COUNTING 10

CONCLUSION 13

APPENDICES:

OPINION OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, MARCH 6, 1997 ..... App. A

ORDER OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, DENYING PETITIONER'S PETITION FOR REHEARING .. App. B

EXCERPT FROM TRIAL TRANSCRIPT .... App. C

EXCERPT FROM TRIAL TRANSCRIPT .... App. D

§1B1.11 - USE OF GUIDELINES MANUAL IN EFFECT ON DATE OF SENTENCING (Policy Statement) ..... App. E

§2F1.1 - FRAUD AND DECEIT ..... App. F

§2F1.1 - FRAUD AND DECEIT ..... App. G

§3B1.1 - AGGRAVATING ROLE ..... App. H

PETITION FOR REHEARING ..... App. I

TABLE OF AUTHORITIES

PAGE

CASES

Miller v. Florida, 482 U.S. 423 (1987) 5

Stinson v. United States, 113 S.Ct. 1913 (1993) 12

United States v. Boula, 997 F.2d 263 (7th Cir. 1993) .. 6, 11

United States v. Cableigh, 75 F.3d 242 (6th Cir. 1996) ... 12

United States v. Canon, 66 F.3d 1073 (9th Cir. 1995) 6

United States v. Curtis, 934 F.2d 553 (5th Cir. 1991) 11

United States v. Godfrey, 25 F.3d 263 (5th Cir.), *cert. denied*, ___ U.S. ___ 115 S.Ct. 429, 130 L.Ed.2d 342 (1994) 10

United States v. Harotunian, 920 F.2d 1040 (1st Cir. 1990) .. 6

United States v. Kelly, 993 F.2d 702 (9th Cir. 1993) 11

United States v. Massey, 48 F.3d 1560 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 429, L.Ed.2d 342 (1994) 10

United States v. Rodriguez, 968 F.2d 130 (2d Cir.), *cert. denied*, 113 S.Ct. 139 (1992) 6

United States v. Romano, 970 F.2d 164 (6th Cir. 1992) .. 10, 12

United States v. Rappaport, 999 F.2d 57 (2d Cir. 1993) .. 10

United States v. Safeels, 39 F.3d 833 (9th Cir. 1994) 6

United States v. Stevenson, 68 F.3d 1292 (11th Cir. 1995) .. 10

United States v. Tisdale, 7 F.3d 957 (10th Cir. 1991), *cert. denied* 114 S.Ct. 1201 (1994) 6

Table of Authorities (continued)

PAGE

United States v. Willis, 997 F.2d 407 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 704, 126 L.Ed.2d 670 (1994) 10

United States v. Wong, 3 F.3d 667 (3d Cir. 1993) 10

STATUTES

18 U.S.C. §3231 4

28 U.S.C. §1254(1) 2

Federal Sentencing Guideline §1B1.11 . . . . . 1, 11

Federal Sentencing Guideline §2F1.1 (1987) 1, 6

Federal Sentencing Guideline §2F11 (1993) 1, 7, 8

Federal Sentencing Guideline §2Fl.l(b)(2)(A) 9, 10, 11

Federal Sentencing Guideline §3Bl.lB(b) 1, 10, 11

United States Constitution, Art.I, §9, cl.3; (ex post facto clause) 1

CITATION TO DECISION IN COURT BELOW

Petitioner's conviction and sentence was affirmed by the Eleventh Circuit Court of Appeals, in *United States v. Logal*, 106 F.3d 1547 (11th Cir.1997).

BASIS FOR JURISDICTION OF THIS COURT

This Petition for Writ of Certiorari follows a judgment of the Eleventh Circuit Court of Appeals affirming Petitioner's conviction and sentence. This Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C.§1254(1).

The Eleventh Circuit Court of Appeals judgment was entered on March 6, 1997, Petitioner's application for rehearing was denied on June 19, 1997. This Court issued an order on extending until October 1, 1997 Petitioner's filing of his Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Petition for Writ of Certiorari relates to the following Constitutional Provisions and statutes:

1. United States Constitution, Art. I, §9, cl.3; (ex post facto clause):

"No Bill of Attainder or ex post facto law shall be passed".

2. Federal Sentencing Guideline §1B1.11.

3. Federal Sentencing Guideline §2Fl.1 (1987).

4. Federal Sentencing Guideline §2Fl.1 (1993).

5. Federal Sentencing Guideline §3B1.1B(b).

CONCISE STATEMENT OF CASE

Petitioner is currently serving a one hundred and two month sentence following his conviction for various mail and security fraud related offenses in the United States District Court for the Southern District of Florida. Petitioner restricts this Petition to issues relating to his sentence.

Petitioner had been employed by a Florida Corporation, Sahlen and Associates, which was involved in various legitimate security related industries. However, through a variety of activities, Sahlen, a public company regulated by the SEC, inflated its worth. The inflated value of Sahlen influenced its stock trade, as well as its ability to borrow money.

Although Petitioner was sentenced in 1994, the sentencing court agreed to utilize the sentencing guidelines in effect in 1989 since those guidelines were clearly more lenient to Petitioner. Unfortunately, the sentencing court calculated a sentence identical to the sentence proscribed by the 1993 Sentencing Guidelines which the sentencing court was precluded from utilizing. Petitioner's sentence accordingly increased nearly fifty percent from a range of 51-63 months to his ultimate sentence of 102 months.

The sentencing court stated that its enhanced sentence was based upon:

1. the extraordinary amount of the loss *and*, independently,

2. the sophisticated nature of the offense and the pervasive role of the defendant.

The 1987 sentencing guidelines set forth an offense level of "17" for amounts of loss attributed to fraud exceeding five million dollars. The 1987 sentencing guidelines do not include

any higher offense level than the "level 17" relating to loss in excess of $5 million.

By contrast, the 1993 sentencing guideline sets forth an offense level of 20 for losses in excess of $5 million. Obvious calculation reveals a three level increase between the 1987 and 1993 guideline.

In addition to increasing the offense level guideline for equal amount of loss, the 1993 sentencing guideline also sets forth offense levels for losses exceeding $5 million. It is clear that the newly created offense levels are related to and dependent upon the increased offense levels for lessor amounts of loss.

Petitioner was found to be responsible for loss in the amount of $59 million. The 1987 Guidelines' highest amount of loss was "in excess of $5 million". The 1993 Guidelines provided for a loss of $59 million. This newly created level was three levels higher than the offense level for a loss in excess of $5 million.

However, since the 1993 offense levels had ben set at higher levels than the 1987 offense levels, a three level increase from the $5 million dollar offense level resulted in an offense level of "23". In contrast, had Petitioner received a three level increase from the 1987 offense level, his adjusted offense level would have been "Level 20".

The sentencing court concluded that it utilized the 1993 Guidelines as "guidance" in determining a higher offense level. Petitioner submitted that the sentencing court's use of the 1993 Sentencing Guidelines violated ;the *ex post facto* clause of the Constitution. Additionally, Petitioner submitted that even if the 1993 Guidelines could be used for "guidance", the use employed by the sentencing court, which included adoption of

a three level increase in offense levels, violated the *ex post facto* clause.

In addition, Petitioner was calculated to have an offense level higher than persons whose amount calculation was higher than Petitioner's.

Petitioner, who proceeded to trial was calculated to have an amount of loss of $59 million. Codefendants who entered plea agreements were found to have losses in *excess* of the $59 million loss attributed to Petitioner. However, these codefendants, Davis (loss in excess of $100,000,000) and Leinwebber (loss in excess of $71 million) did not receive the six point offense level increase based upon specific offense characteristics received by Petitioner. No basis existed for this disparate sentencing treatment received by Petitioner.

Petitioner was also assessed additional points *both* for his role in the offense as well as for the sophistication of the offense. Petitioner challenged the sentencing court's authority to "double count" the same activity for two separate offense enhancements.

1. *Basis for Federal Jurisdiction in the Court of First Instance.*

Jurisdiction in the United States District Court for the Southern District of Florida was created pursuant to 18 U.S.C. §3231 with the return of an indictment alleging offenses against the laws of the United States.

ARGUMENT

I.

THE SENTENCING COURT'S USE OF THE 1993 SENTENCING GUIDELINES TO IMPOSE A SENTENCE GOVERNED BY 1987 SENTENCING GUIDELINES, VIOLATES THE EX POST FACTO PROTECTION OF THE CONSTITUTION

The sentencing court imposed Petitioner's 102 month sentence in 1994 by improperly utilizing 1993 sentencing guidelines. The 1993 sentencing guidelines provided a more severe penalty than the 1987 sentencing guidelines in effect at the time the offense was committed. Use of the 1993 more severe sentencing guidelines violated the *ex post facto* clause of the Constitution.

While the federal sentencing guidelines require use of the guidelines in effect at the time of sentencing, a specific exception to that requirement arises when the sentence to be imposed under the guidelines in effect at the time of sentencing are more severe than the guidelines in effect at the time of the offense being committed. *See Miller v. Florida*, 482 U.S. 423 (1987); §1B1.11 U.S.S.G.

The sentencing court recognized that Petitioner's guidelines in effect at the time of sentencing were more severe than the sentencing guidelines in effect at the time of the offense (1989) and therefore opted to sentence Petitioner pursuant to the 1987 guidelines.

Unfortunately, the sentencing court's decision to utilize the 1987 guidelines as opposed to the 1993 guidelines constituted little more than a legal fiction. The vehicle through which the fiction was facilitated was the sentencing court's finding that the 1987 guidelines did not adequately account for the size of loss in Petitioner's case as well as the sophisticated nature of

the offense and the pervasive role of the Petitioner in that offense.

Petitioner does not dispute the finding that application note ten to the relevant guideline provision §2F1.1 (1987) did allow the court to upwardly depart for amounts of loss in excess of $5 million. Petitioner, for the purpose of this application, does not contest that the sentencing court concluded that the amount of loss was $59 million.

Petitioner does dispute the methodology utilized by the sentencing court in applying the 1993 guidelines as "guidance" in determining the amount of enhancement to be applied.

Petitioner would respectfully request that this Court resolve a split between the Circuits concerning whether amendments to sentencing guidelines should be utilized as "guidance" to sentencing courts. *See United States v. Canon*, 66 F.3d 1073, 1080 (9th Cir. 1995)(disapproving of retroactive guidance); *United States v. Safeels*, 39 F.3d 833, 838 (8th Cir. 1994); *United States v. Tisdale*, 7 F.3d 957, 967-68 (10th Cir. 1991), *cert. denied*, 114 S.Ct. 1201 (1994); *United States v. Boula*, 997 F.2d 263, 267 (7th Cir. 1993); *United States v. Rodriguez*, 968 F.2d 130 (2d Cir.), *cert. denied*, 113 S.Ct. 139 (1992); *United States v. Harotunian*, 920 F.2d 1040 (1st Cir. 1990)(approving retroactive guidance).

Petitioner respectfully submits that any use of a subsequent amendment as "guidance" is in reality nothing more than an unauthorized judicial exception to the *ex post facto* clause. No viable test exists to determine whether the subsequent amendment is being utilized as "guidance" or is in fact being relied upon as the operative guideline.

Petitioner's case provides a more compelling example of why the subsequent guideline amendment should not be relied upon. The guideline in question, §2F1.1 in its 1987 version, did

not provide an offense level for amounts of loss substantially greater than $5 million. It did, however, provide for amounts of loss greater than $5 million with an offense level of "seventeen". In contrast, the 1993 amendment to §2F1.1 provided an offense level of "twenty" for losses in excess of $5 million. In addition, the 1993 amendment provided a three level offense level increase for amounts of loss in excess of $40 million. Consequently, a person sentenced under the 1993 amendment with a loss amount of $59 million would have an offense level of twenty-three.

A sentencing court that truly utilized the 1993 amendment to §2F1.1 to determine an offense level for amounts greatly in excess of $5 million would observe that the amendment provided a three level increase in the offense level for the proscribed level for a $5 million loss. In Petitioner's case, his offense level would increase three levels from his 1987 offense level of twenty to an offense level of twenty-three.

However, if the sentencing court merely adopted the 1993 amendment and rubber stamped to the offense level set forth in 1993 without regard to the fact that the entire offense level had been increased in 1993 from the 1987 levels, the 1993 level would not be utilized as "guidance" but in fact, be substituted for the 1987 guideline.

In Petitioner's case, the sentencing court impermissibly substituted the 1993 sentencing guideline for the 1987 guideline. Even should this Court permit subsequent guideline amendments to be used for "guidance"; the sentencing court in the instant case traveled far beyond even the most acceptable level of guidance.

Petitioner respectfully requests that this Court resolve the split among the circuits and determine that subsequent increases in offense levels created by Sentencing Guidelines amendments may not be utilized by sentencing courts as

"guidance" in imposing sentences. In the alternative, Petitioner requests that this Court conclude the subsequent amendments may only be utilized to determine the quantity of levels determined to apply for undetermined levels of conduct.

II.

THE SENTENCING COURT'S DISSIMILAR APPLICATION OF SIMILAR SPECIFIC OFFENSE CHARACTERISTICS AMONG IMPROPER CO-DEFENDANTS CONSTITUTES DISPARATE SENTENCING

Petitioner's sentencing was governed by the provisions of §2F1.1 U.S.S.G. The sentencing guideline section identifies "specific offense characteristics" which are based upon the amount of loss suffered by the fraud victim. While the amount of loss attributed to any particular defendant in a multiple defendant case may logically differ, similar amounts of loss should not result in dissimilar specific offense characteristics. Unfortunately, the sentencing judge implemented among co-defendants dissimilar offense characteristics which ultimately resulted in impermissible disparate sentences.

Petitioner's "amount of loss" was calculated to be in the amount of $59 million. The sentencing court found an offense level of twenty-three based upon a specific offense characteristic of "17". However, the record in the sentencing court reveals that despite the fact that at least three co-defendants had amounts of loss equal to or greater than Dahod's, the sentencing court found specific offense characteristics for those codefendants to be *less* than Dahod's.

> Application note 10 to the 1987 guideline provided that: The adjustments for loss do not distinguish frauds involving losses greater than $5,000,000. *Departure above the applicable guideline*

may be warranted if the loss substantially exceeds that amount.

(Emphasis added).

The Application Note does not identify the activity of the defendant as a basis to depart, but rather unequivocally identifies the amount of loss as the only basis for departure. Accordingly, it should be axiomatic that codefendants with similar amounts of loss should not receive dissimilar specific offense characteristics.

That Petitioner suffered this disparity, to wit: an extra six levels on the offense level compared to the offense levels of codefendants is improper and mandates Petitioner's resentencing in a manner consistent with that of his co-defendants.

Petitioner recognizes that a variety of other offense characteristics or individual roles may influence the ultimate adjusted offense level. However, no legitimate or acceptable argument can support dissimilar specific offense characteristics based upon similar losses.

Petitioner is particularly concerned that the only discernable difference between himself and his codefendants who did not receive additional specific offense characteristics increases was that Petitioner exercised his right to trial.

Allowing disparities which may be based upon the exercise of Constitutional rights should be unacceptable.

Petitioner requests that this Court determine that application of the specific offense characteristics of §2Fl.l(b) require that whatever factual finding concerning the amount of loss is made relating to an individual defendant that the sentencing court equally apply said offense characteristics.

Since Petitioner has been victimized with an offense level six points higher than codefendants found to have an amount of loss in excess of that of Petitioner, he requests that his case be remanded for resentencing in a manner consistent to that of his co-defendants.

III.

IMPOSITION OF SENTENCE ENHANCEMENTS PURSUANT TO BOTH §2Fl.l(b)(2) AND §3Bl.lB(b) U.S.S.G. CONSTITUTES IMPERMISSIBLE DOUBLE COUNTING

Petitioner's sentence included cumulative enhancements based upon two sentencing guideline provisions, §2Fl.l(b)(2) (more than minimal planning) and §3Bl.lB(b) (role as manager or supervisor). These enhancements constitute impermissible double counting. Petitioner's objection to said double counting was improperly overruled.

A clear split exists in the circuits concerning the specific issue. *See Untied States v. Romano*, 970 F.2d 164, 167 (6th Cir. 1992) (considerations of lenity and due process forbid the cumulative application of the two guideline sections in the absence of a clear statement permitting such use); *United States v. Stevenson*, 68 F.3d 1292 (11th Cir. 1995)(double counting of the provisions permitted unless specifically prohibited by sentencing guidelines). *Stevenson* relied upon the following decisions from other circuits supporting its conclusion: *United States v. Massey*, 48 F.3d 1560, 1570 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2628, 132 L.Ed.2d 868 (1995); *United States v. Godfrey*, 25 F.3d 263, 264 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 429, 130 L.Ed.2d 342 (1994); *United States v. Wong*, 3 F.3d 667, 670-72 (3d Cir. 1993); *United States v. Rappaport*, 999 F.2d 57, 60-61 (2d Cir. 1993); *United States v. Willis*, 997 F.2d 407, 418-19 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 704, 126 L.Ed.2d 670 (1994);

United States v. Kelly, 993 F.2d 702, 704-05 (9th Cir. 1993); *United States v. Curtis*, 934 F.2d 553, 556 (5th Cir. 1991); *United States v. Boula*, 932 F.2d 651, 654-55 (7th Cir. 1991).

Petitioner received, without objection, a two level increase based upon "more than minimal planning" U.S.S.G. §2F1.1(b)(2)(A). Petitioner received, over objection, a three level increase for his role as a manager or supervisor of more than five persons. The sentencing court rejected the Government's argument that Petitioner receive a four point increase as an organizer or leader.

Petitioner submits that the same conduct which formulated the "more than minimal planning" enhancement was utilized to designate Petitioner as a "manager or supervisor". Simply stated, being a manager or supervisor of five or more persons necessitates more than minimal planning.

Petitioner respectfully submits that the failure of the 1987 Sentencing Guidelines to specifically allow for the double counting of §§2F1.1(b)(2) and 3B1.1(b), requires that only one of the two enhancements be permitted. Respondent requests that this Court adopt the *Romano* rationale and conclude that the absence of guideline authorization precludes double counting as violative of due process and the rule of lenity in criminal cases.

Finally, Petitioner recognizes the relative narrow application of this issue. Effective November 1, 1993, the Application Notes to §1B1.1 U.S.S.G. was amended:

> "Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). For example, the adjustments from §2F1.1(b)(2)(more than minimal planning) and §3B1.1(aggravating role) are applied cumulatively.".

> This amendment clarifies the Commission's intent that, absent an instruction to the contrary, adjustments from different guideline sections are to be applied cumulatively. The effective date of this amendment is November l, 1993.

Indeed, the Sixth Circuit refused to follow *Romano* in sentencing after November, l993 which presumably were based upon l993 guidelines. *United States v. Cableigh*, 75 F.3d 242 (6th Cir. 1996).

While Petitioner was sentenced subsequent to the 1993 amendment, it is without question that he was sentenced pursuant to the 1987 Guidelines. Additionally, although the language to the Amendment to §lBl.l is couched in terms of "clarification", the effect of the Amendment subjected Petitioner to a greater sentence than the l987 guidelines as interpreted by *Romano*. Further, given the binding nature of commentary amendments, see *Stinson v. United States*, 113 S.Ct. 1913 (1993), application of the Amendment to Petitioner would violate the *ex post facto* clause.

Petitioner therefore requests that his case be remanded for resentencing with instructions that Petitioner not receive the "double counting" described herein.

CONCLUSION

Wherefore, based upon the foregoing authority, Petition respectfully requests that the Honorable Court accept jurisdiction over this matter, grant this Petition for Writ of Certiorari, address the questions presented herein, and reverse the judgment of the Eleventh Circuit Court of Appeals affirming Petitioner's sentence.

Respectfully submitted,

BRUCE A. ZIMET, ESQUIRE

APPENDICES

APPENDICES

See the record excerpt provided on appeal from the U.S. District Court for copies of pleadings there.

OPINION OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, MARCH 6, 1997 ..... App. A

ORDER OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, DENYING PETITIONER'S PETITION FOR REHEARING . App. B

EXCERPT FROM TRIAL TRANSCRIPT .... App. C

EXCERPT FROM TRIAL TRANSCRIPT .... App. D

§1B1.11 - USE OF GUIDELINES MANUAL IN EFFECT ON DATE OF SENTENCING (Policy Statement) ..... App. E

§2F1.1 - FRAUD AND DECEIT ..... App. F

§2F1.1 - FRAUD AND DECEIT ..... App. G

§3B1.1 - AGGRAVATING ROLE ..... App. H

PETITION FOR REHEARING ..... App. I

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nelson LOGAL, Aarid Dahod, a.k.a. Aarid Mansur Dahodwala, John Kuczek,
Defendants-Appellants.
No. 94-4748
United States Court of Appeals,
Eleventh Circuit,

March 6, 1997.

Various defendants were convicted of mail and securities fraud violations, and were ordered to pay restitution, in the United States District Court for the Southern District of Florida, No. 93-6014 CR-SM, Stanley Marcus, J. Defendants appealed. Following one defendant's death by suicide, counsel filed "suggestion of death" with Court of Appeals, asking that appeal be dismissed as moot and case be returned to District Court with instructions to dismiss indictment. The Court of Appeals, Dubina, Circuit Judge, held that: (l) as to surviving defendants, trial court could consider amendments to Sentencing Guidelines adopted after offenses in question were completed, in determining suitable degree of upward departure from Guidelines in effect at time of offenses, and (2) as to deceased defendant conviction would be vacated, even through restitution was involved.

Affirmed in part; vacated in part and remanded.

Cohill, Senior District Judge, sitting by designation, concurred in part and dissented in part and filed opinion.

1. **Criminal Law - 1239**

Trial court could consider amendments to Sentencing Guidelines effective after date offense was completed in determining degree of upward departure from Sentencing Guidelines applicable to defendant. U.S.S.G. §1B1.1 et seq., 18 U.S.C.A.

2. **Criminal Law - 303.50, 1208.4(2)**

Defendant's conviction would be vacated, following his death by suicide, even though part of sentence involved payment of restitution under Victim and Witness Protection Act; restitution requirement was penal in nature rather than compensatory and there were civil actions which could prevent estate of defendant from receiving windfall. 18 U.S.C.A. §3663.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT, Chief Judge, DUBINA, Circuit Judge, and COHILL* ,Senior District Judge.

DUBINA, Circuit Judge.

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*Honorable Maurice b. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting be designation

I. Statement of the Case

1. Factual History.

In 1981, Howard F. Sahlen, Jr. ("Sahlen") founded a private investigation and security firm called Sahlen & Associates, Inc. ("SAI"). Sahlen was chairman and chief executive officer of the company through April of 1989. In 1984, SAI became a publicly traded company with its headquarters in Atlanta, Georgia. [1]

As a publicly traded corporation, SAI was required to file a registration statement with the Securities and Exchange Commission ("SEC") detailing certain information for use by potential investors. In addition, SAI was required to file quarterly and annual reports containing financial information about the corporation's worth and profit levels. Financial statements included in SEC filings must be audited, and between 1985 and 1989 SAI's annual reports were audited by the accounting firm of Peat Marwick or its predecessor, Main Hurdman.

Between 1983 and 1989, SAI's operation grew from one office with 10 to 15 employees to about 100 offices with approximately 12,000 employees, and the company reported a tremendous increase in revenues. Unfortunately, SAI achieved this growth by making public stock offerings and obtaining bank loans through the use of false financial documents. SAI employees and others -- including Sahlen, Nelson Logal ("Logal"), Aarif Dahod ("Dahod"), and John Kuczek ("Kuczek") -- used various means to misrepresent SAI's financial condition, including check kiting, falsifying revenue figures in financial statements, and creating false documents to support the inflated revenue figures. Sahlen, Logal, Dahod,

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[1] The headquarters were later relocated to Deerfield Beach, Florida.

and Kuczek also devised and implemented various schemes to conceal the fact that they had inflated and fabricated SAI's revenue figures.

One of Sahlen's schemes to inflate revenue figures involved the generation of false invoices and investigative files for clients who were closely associated with Sahlen. SAI listed these accounts, which were never paid, under the heading of "special accounts"., P.J. Management --whose president, Logal, was a childhood friend of Sahlen -- enjoyed one of these "special accounts" with SAI. Kuczek & Associates, an insurance brokerage company owned by Kuczek, also had a "special account" during the 1987 fiscal year. Dahod was actively involved in the generation of false investigative files to authenticate the invoices, even going so far as to create a computer program to facilitate the generation of false documentation on a computer he called "Betsy".

In order to disguise the financial instability of SAI, Sahlen devised a check kiting scheme to give the illusion that SAI had the funds necessary to pay operating expenses. Logal, who was operating his own business in Ohio called N.H. Logal, assisted Sahlen in the check kiting scheme by helping to deposit checks with full knowledge that the checks were backed by insufficient funds. In another scheme to conceal SAI's true fiscal status, SAI reported non-existent revenue in a category called "work in progress". [2]

The reporting of false revenue escalated substantially with each quarterly report filed by SAI, ultimately growing to $7,124,073. The house of cards began to fall when auditors from Peat Marwick started expressing concern about the large

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[2] "Work in progress" is an accounting device used to to report anticipated revenues from partially completed work.

amount of aging accounts receivable on SAI's books. Peat Marwick told Sahlen that unless SAI began showing significant collections activities, the accounts receivable figures would have to be discounted, which would result in the reporting of much smaller income and revenue figures. To cover up the false revenue reported as accounts receivable, the defendants created additional schemes.

By the end of 1988, the amount of false revenue had grown to millions of dollars,, and most of the uncollected receivables were fictitious. In late March of 1989, Sahlen learned that the SEC was investigating SAI's methods of reporting revenue. Sahlen also learned that Peat Marwick auditors planned to visit SAI's Miami, Florida, and Newark, New Jersey, field offices to examine files. Upon completion of its investigation, the SEC sought federal indictments against Sahlen, Logal, Dahod, and Kuczek.

2. Procedural History.

A federal grand jury in the Southern District of Florida returned a 29-count superseding indictment charging Logal, Dahod, and Kuczek, as well as Sahlen, with various violations of federal law.[3] All four defendants were charged in count l with conspiring to defraud the SEC and to commit securities fraud, bank fraud, and mail fraud, in violation of 18 U.S.C. §371, and in count 28 with filing a false registration statement with the SEC on or about March 14, 1989, in violation of 15 U.S.C. §§78m and 78ff(a) and l8 U.S.C. §2. Logal, Dahod, and Sahlen were also charged with seven counts of securities fraud, in violation of l5 U.S.C. §§78j(b) and 78ff(a), 17 C.F.R. §240.10b-5 (Rule 10b-5),and 18 U.S.C. §2 (counts 2-8); eight

[3] Additional defendants Theordore Leinwebber, Paula Firebaugh, and Tony Davis pled guilty before the return of the superseding indictment and testified for the government at trial.

counts of mail fraud, in violation of 18 U.S.C. §§1341 and 2 (counts 9-16); six counts of filing false reports and statements with the SEC, in violation of 15 U.S.C> §§78m adj 78ff(a) and 18 U.S.C> §2 (counts 22-27); and one count of bank fraud, in violation of 18 U.S>C. §§1344 and 2 (count 29). Logal was charged with one additional count of bank fraud (count 17), and Sahlen was charged with five additional counts of bank fraud (counts 17-21).

Sahlen pled guilty to all counts of the indictment, but Logal, Dahod and Kuczek proceeded to trial. The district court granted a motion for judgment of acquittal as to Dahod and Logal on count 9. The jury found Logal guilty of counts 1-8, 10-16, 22-25, and 29, and not guilty of counts 17 and 26-28. The jury found Dahod guilty of counts 1-8, 10-16, and 24-29, and not guilty of counts 22 and 23. The jury found Kuczek guilty of count 1 and not guilty of count 28.

Logal was sentenced to 60 months imprisonment as to count 1 and to 27 months of imprisonment as to the remaining counts, with the 27-month sentence to run consecutively to the 60-month sentence, for a total of 87 months of imprisonment. The court also ordered Logal to pay restitution totaling $59,338,184. Dahod was sentenced to a total of 144 months imprisonment and ordered to pay restitution inn the amount of $59,338,184. Kuczek was sentenced to 37 months imprisonment and a 3-year term of supervised release and ordered to pay a fine of $4,000 adj restitution totaling $21,586,487. Logal and Dahod are currently incarcerated.

Kuczek is not incarcerated, however, because he committed suicide the day before he was to begin serving his term of imprisonment. Following Kuczek's suicide, his counsel filed a "suggestion of death" with this court and asked this court to dismiss Kuczek's appeal as moot, to vacate Kuczek's sentence and conviction *in toto*, and to remand the

case to the district court with instructions to dismiss the indictment. This court ordered that Kuczek's motions be carried with the case and instructed Kuczek's counsel to address in his brief the effect of Kuczek's suicide on the restitution order imposed by the district court. In response to a motion for clarification, we specified that only issues relating to the effect of Kuczek's death on the restitution order should be addressed in Kuczek's appellate brief.[4] In his brief, counsel for kuczek requests that he be allowed to file a brief presenting further challenges to the restitution order if this court determines that it has jurisdiction to entertain the merits of the appeal.

II. Issues Presented

1. Whether the district court abused its discretion by denying Logal's motions for severance from Kuczek.
2. Whether Dahod's allegations of prosecutorial misconduct warrant reversal of his and Logal's convictions.
3. Whether the district court abused its discretion by admitting challenged evidence.
4. Whether the district court abused its discretion by declining to give requested jury instructions.
5. Whether the district court abused its discretion in framing its response to a jury question.
6. Whether the district court properly sentenced Dahod and Logal.
7. Whether the restitution component of Kuczek's sentence survives his death.

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[4] Counsel for Kuczek complied fully with this court's directives.

8. Whether this court should dismiss Kuczek's appeal as moot, vacate his conviction and sentence, and remand this matter to the district court to dismiss the indictment.

III. Standards of Review

Regarding all but the last three issues presented in this appeal, we conclude that the defendants' arguments are meritless. Accordingly, we affirm the defendants' convictions without further discussion.[5] We also affirm without discussion all of the sentencing issues raised by Dahod and Logal, save for their contention that the district court, in imposing their sentences, violated the Ex Post Facto Clause of the Constitution by considering amendments to the United States Sentencing Guidelines ("U.S.S.G." or "guidelines") that went into effect after Dahod and Logal's crimes had been completed. A defendant's claim that his or her sentence was imposed in violation of the Ex Post Facto Clause presents a question of law, and we review questions of law *de novo*. *See, e.g., United States v. Hooshmand*, 931 F.2d 725, 727 (11th Cir. 1991). The remaining issues--viz, whether the restitution component of Kuczek's sentence survives hid death, and whether this court should dismiss the appeal as moot, vacate Kuczek's conviction and sentence, and remand to the district court for dismissal of the indictment--also present questions of law subject to *de novo* review. *See generally, United States v. Asset*, 990 F.2d 208 (5th Cir. 1993); *United States v. Dudley*, 739 F.2d 175 (4th Cir. 1984); *United States v. Schumann*, 861 F.2d 1234 (11th Cir. 1988).

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[5] See 11th Circuit Rule 36-1.

IV. Discussion

1. *Guidelines Issue.*

[1] Although Dahod and Logal were sentenced in 1994, they were sentenced pursuant to the pre1989 guidelines, because their offenses had ended prior to the enactment of the 1989 amendments and because those amendments included increases int he offense levels for fraud cases. *See Miller v. Florida*, 482 U.S. 423, 435-36, 107 S.Ct. 2446, 2454, 96 L.Ed.2d 351 (1987). Both Dahod and logal acknowledge that the district court imposed sentence on them pursuant to the pre-1989 version of U.S.S.G. §2F1.1. Nevertheless, they argue that the district court violated the Ex Post Facto Clause by looking to the 1989 amendment to §2F1.1 for guidance in determining the degree of their upward sentencing departures. Because the court indisputably used the pre-1989 guidelines to sentence Dahod and Logal, we conclude that no Ex Post Facto Clause violation occurred. Moreover, we note that six of our sister circuits have already approved the practice of looking at guidelines amendments that post-date applicable guidelines for the purpose of determining the appropriate degrees of upward sentencing departures. *See*, *United States v. Harotunian*, 920 F.2d 1040, 1046 (1st Cir. 1990)(approving use of amended guideline to guide upward departure); *United States v. Rodriguez*, 968 F.2d 130, 140 (2d Cir.) (same) *cert. denied*, 506 U.S. 847, 113 S.Ct. 140, 121 L.Ed.2d 92 (1992); *United States v. Bachynsky*, 949 F.2d 722, 734-35 (5th Cir. 1991) (approving district court's consideration of proposed amendments to §2F1.1 in determining level of upward departure), *cert. denied*, 506 U.S. 850, 113 S.Ct. 150, 121 L.Ed.2d 101 (1992); *United States v. Boula*, 997 F.2d 263, 267 (7th Cir. 1993)(approving district court's consideration of amended §2F1.1 to fashion upward departure and rejecting argument that doing so constituted application of the amended guideline); *United States v.*

Saffeels, 39 F.3d 833, 838 (8th Cir. 1994)(holding that "subsequent guidelines can be a useful touchstone in making the determinations of reasonableness called for in upward departure cases"); *United States v. Tisdale*, 7 F.3d 957, 967-68 (10th Cir. 1993)(holding that use of amended guideline to guide upward departure is permissible so long as the district court understands that the amended guideline provision is not controlling), *cert denied*, 510 U.S. 1169, 114 S.Ct. 1201, 127 L.Ed.2d 549 (1994). *But see United States v. Canon*, 66 F.3d 1073, 1080 (9th Cir. 1995)(holding that district court erred in referring to amended guideline to determine reasonable amount of upward departure). We choose to adopt the majority view of our sister circuits. Accordingly, we affirm Dahod and logal's sentences.

2. *Restitution.*

[2] Counsel for Kuczek asserts that the restitution order entered by the district court cannot survive Kuczek's suicide. Kuczek was sentenced to serve a 37 month term of imprisonment and a 3-year term of supervised release. Additionally, Kuczek was ordered to pay a fine of $4,000 and restitution totaling $21,586,487, pursuant to the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §3663. Kuczek filed a notice of appeal, but the day before he was to begin serving his sentence of incarceration, he committed suicide. Kuczek's appellate attorney argues that his client's death rendered the entire conviction and sentence, including the restitution order, void *ab initio*, and that the restitution order is therefore without effect.

This circuit has adopted the general rule that the death of a defendant during the pendency of his direct appeal renders his conviction and sentence void *ab initio, i.e.*, it is as if the defendant had never been indicted and convicted. *See, United*

States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980);[6] *United States v. Schumann*, 861 F.2d 1234, 1236 (11th Cir. 1988). However, two of our sister circuits have recognized an exception to the general rule of abatement *ab initio* in cases in which a criminal sentence includes an order that the defendant pay restitution to the victims of his crimes. *See United States v. Dudley*, 739 F.2d 175, 177 (4th Cir. 1984); *United States v. Asset*, 990 F.2d 208 (5th Cir. 1993). In *Dudley*, the Fourth Circuit premised its holding on the assumption that a restitution order is compensatory in nature. That assumption is clearly at odds with out holding in *United States v. Johnson*, 983 F.2d 216, 220 (11th Cir. 1993), that "though restitution resembles a judgment 'for the benefit of' a victim, it is penal, rather than compensatory." Furthermore, any implication that restitution resembles a civil judgment is undermined in this court's opinion in *United States v. Satterfield*, 743 F.2d 827, 836 (11th Cir. 1984) *cert. denied*, 471 U.S. 1117, 105 S.Ct.. 2362, 86 L.Ed.2d 262 (1985).

The Fifth Circuit's opinion in *United States v. Asset*, 990 F.2d 208 (5th Cir. 1993), is also distinguishable. *Asset* held only that an abatement did not disturb a voluntary restitution payment made prior to the defendant's death. *Id.* at 214. This holding is in accordance with our decision in *Schumann* where we amended *Pauline* to hold that only fines not yet collected at the time of death are abated. *Schumann*, 861 F.2d at 1236.

If we were to allow the restitution order to survive Kuczek, a statutory problem would also arise. Title 18 U.S.C. §3663(a)(l) states that before the court can impose a restitution order, a defendant must first be convicted of a crime. Under

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

the doctrine of abatement *ab initio*, however, the defendant "stands as if he never had never been indicted or convicted." *Schumann*, 861 F.2d at 1237. The absence of a conviction precludes imposition of the restitution order against Kuczek or his estate pursuant to §3663.

Moreover, a fundamental principle of our jurisprudence from which the abatement principle is derived is that a criminal conviction is not final until resolution of the defendant's appeal as a matter of right. See *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956). AS the Seventh Circuit has stated, "when an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal. . . ." *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977). In the present case, Kuczek appealed both the conviction and the restitution order with the expectation that his appeal would result in a reversal. To uphold the restitution order against Kuczek, who has been denied the opportunity to properly contest his conviction, violates the finality principle.

Concerning the argument that the heirs of Kuczek's estate may receive a windfall, nothing precludes the victims from bringing a separate civil action to prevent any improper benefit to Kuczek's estate. Accordingly, we grant Kuczek's motion requesting that we vacate his conviction adj sentence, remand the case to the district court, and instruct the district court to dismiss the indictment.

AFFIRMED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion.

COHILL, Senior District Judge, concurring in part and dissenting in part.

I respectfully dissent from that portion of the opinion in which a majority of the panel holds that Mr. Kuczek's death by suicide, before his appeal was decided, necessitates the abatement of the restitution order. While *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977), states that a conviction can not stand where "death has deprived the accused of his right to appeal our decision," in this case the accused deprived himself of that right by his own hand. This situation is more analogous to the scenario in which the appellant in a criminal case becomes a fugitive; in such a case, his appeal is lost. *Molinaro v. New Jersey*, 396 U.S. 365, 365-366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586 (1970). I believe that a narrow exception should be carved out of the general abatement rule where an appellant takes his own life.

I join in the opinion in all other respects.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4748

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

NELSON LOGAL; AARIF DAHOD,a.k.a. Aarid Mansur Dahodwala; JOHN KUCZEK,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

BEFORE: HATCHETT, Chief Judge, DUBINA, Circuit Judge, and COHILL*, Senior District Judge.

PER CURIAM:

The petition for rehearing filed by the Appellant, Aarif Dahod is denied.

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*Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting be designation

The petition for rehearing filed by the Appellee, United States of America is denied.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX C

THE COURT: If you and your client would approach the podium.

As I said earlier, this Court has had the opportunity to think a great deal about the case. I presided over the trial that lasted from November well into February. We had extensive hearings as to the nature and extent of the loss, sentencing hearings a couple of weeks ago, and continued it to today.

After considering the statements by all of the parties, having reviewed the presentence investigative report, and based upon the large amount of the loss involved, extraordinary amount of loss involved in this case, and, indeed, independently based upon the sophisticated nature of the offense and the pervasive role the defendant played in that regard, I believe that a sentence that departs above the applicable guidelines range is appropriate in this case.

The defendant argues first that no departure is appropriate.

Second, that if a departure is appropriate and to the extent that it's calculated or grounded in the loss, that it ought to be a three-level increase.

I do not share that view.

The loss chart for a 2F1.1 for fraud and deceit calculated at a loss in excess of $5,000,000 is meriting an ll-point increase int he defendant's offense level.

The defendant argues that a 14-point increase at most is appropriate calculating the loss between $5,000,000 and $10,000,000, therefore meriting the 14-point increase. This 3-point difference contained in the $5,000,000 fraud level should be taken out of the Court's calculus of Dahod's offense level the defendant contends because otherwise it would constitute

impermissible retroactive application of harsh or subsequent guideline provisions.

I do not agree. I begin by observing that application note 10 of the 1987 Guidelines specifically says the Court can depart upward for amounts of loss greatly in excess of $5,000,000 even if the subsequent guidelines did not offer additional guidance. And they do offer guidance to the Court as to the amount to increase the offense level for a $59,000,000 loss. We would clearly depart the six levels based upon this Court's specific finding as to the amount and extent, the seriousness of the loss. I made specific findings as to Sahlen, Logal, and now Dahod as to the nature and extent of the loss and the fraud, and it fully justifies a six-level upward departure in this case based simply on loss.

I have taken into account all of the factors that the parties have asked me to look at, but I believe that a six-level departure based upon loss alone is altogether warranted in this case. We are talking here about a loss that I have calculated at $59,338,184. It is greatly beyond the $5,000,000 figure, which is the top of the figure used in the loss chart for the 1987 Guidelines.

An altogether independent basis for upward departure here would be the sophisticated nature of the offense and the pervasive role that the defendant played in this scheme, and I think it is fair and accurate to describe his role as being pervasive and to define the scheme as being extraordinarily sophisticated in nature.

If the defendant had been sentenced under the 1993 Guideline manual, 17 levels would have been added to the base offense level because the loss was, as this Court has found, at least $59,000,000.

AS I said, I think there are two wholly independent bases for an upward departure, either of which would be more than sufficient to satisfy me. I think they are both evidence in this case. First is the extraordinarily large amount of loss here, $59,000,000, adj second is, as I said, the extraordinarily sophisticated nature of the offense and the defendant's pervasive role in the offense.

If, indeed, this Court were to look at the 1993 Guideline manual for guidance -- and I underscore it is for guidance -- 17 levels would have been added to the base offense level because the loss was at least $59,000,000. That would have resulted in a total offense level of 30, which would have a guideline imprisonment range of 97 to 121 months.

I look to that for guidance, as I said. I will impose a sentence within, but at the lower end, although not at the bottom of that range.

Furthermore, it is the finding of the Court that the defendant is not able to pay a fine. Accordingly, none shall be imposed. The defendant does, however, have a compelling responsibility to pay restitution to the victims of the offense and will be required to do so.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Aarif Dahod, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 102 months. That breaks down as follows: This term consists of 60 months on each of counts 1 through 8, counts 10 through 16 and counts 24 through 28, each to be served concurrently with the other.

Additionally, this term consists of 42 months on count 29 to be served consecutively to the terms imposed on counts 1 through 8, 10 through 16 and 24 through 28.

It is further ordered and adjudged that the defendant shall pay restitution in the amount of $59,338,184 jointly and severally with all of the other co-defendants. No further payment shall be required after the sum of the amounts paid by all of the defendants has fully covered the financial loss sustained by the victims.

Upon release from imprisonment the defendant shall be placed on supervised release for a term of three years. While on supervised release the defendant shall not commit another Federal, state or local crime and shall comply fully with the standard conditions adopted by the Court.

The defendant shall be required, as well, to provide full financial disclosure to the probation officer as requested. The defendant shall not be employed in the securities or investigative field if this employment involves his preparing billing statements or time and expense logs for customers. The defendant shall make full disclosure of the instant offense to any subsequent employer.

It is further ordered and adjudged that the defendant shall pay to the United States a special assessment in the amount of $1,050.

Now that sentence has been imposed, counsel, does counsel or the defendant have any objection to any finding of fact, conclusion of law or manner by which sentence waas pronounced?

Mr. Zimet.

(Trial Transcript 49-54).

APPENDIX D

THE COURT: Let me give you my thought on that. Essentially what the defendant is arguing here is that by sentencing him under both 2F1.1(b)(2) for more than minimal planning and 3B1.1, adjustment for role for being an organizer, leader, manager or supervisor, amounts to impermissible double counting and, therefore, is proscribed.

The support for the Dahod position is found in United States versus Romano, a Sixth Circuit case cited by Mr. Zimet at 970 F.2d 164, Sixth Circuit, 1992.

As best I can tell, the Eleventh Circuit has not yet squarely ruled on precisely this issue. Every other circuit that has ruled on it, however, has rejected the position taken in Romano, and, indeed, even the Sixth Circuit has cut back on the position to some extent there.

I cite to you United States versus Curtis, a Fourth Circuit case, 934 F.2d 553, Fourth Circuit, 1991; United States versus Godfrey, brand new opinion out of the Fifth Circuit -- it's not reported yet in F.3d -- it's 1994 WL-279830. that's in the Westlaw, Fifth Circuit, June the 24th, 1994, an opinion rendered by Judge Wisdom. The third would be an Eighth Circuit case, U.S. v. Willis, 997 F.2d 407 at 418 and 419 decided in 1993.

The three Courts that I have cited have directly disagreed with the contention that sentencing a defendant pursuant to the two sentencing provisions constitutes double counting.

The logic behind the position that these circuits have taken is essentially those two provisions constitute distinct conceptual bases for sentencing the defendant. 2F1.1(b)(2) increases the punishment whether defendant's crime evidenced planning and forethought. 3B1.1 recognizes the additional

culpability that a defendant should bear for being a leader or organizer of a criminal activity that may involve five or more participants.

Accordingly, if the crime has its base offense level increased for more than minimal planning, it may be enhanced as well.

Again, if the defendant, in addition, is one who organized or led the planning of the offense.

The Eleventh Circuit has not ruled upon this specific issue. At lease I don't think it has. It has repeatedly held that what would otherwise be considered double counting is permissible if the Sentencing Commission intended the result and if the result is permissible, because each section concerns conceptually separate notions relating to sentencing.

That's the language that comes out of the Eleventh Circuit in U.S. versus Adeleke, A-d-e-l-e-k-e, 968 F.2d 1159 at 1161. That's an Eleventh Circuit case decided in 1992.

Quoting an earlier Eleventh Circuit case, U.S. versus Aimufua, 935 F.2d 199 at 1201, Eleventh Circuit, 1991.

It appears to me that based upon the more than convincing reasons in the opinions of the Willis court, the Curtis court and the court in Godfrey that these are two provisions here that involve conceptually distinct bases, and so the contention to follow Romano is rejected.

I might add that courts have distinguished Romano from their cases on the basis that Romano only dealt with one-half of the 2F1.1(b)(2), the more than minimal planning aspect of that provision. Romano did not address the more than one victim portion of the provision.

Indeed, the Fifth Circuit in Godfrey relied on this rationale as an alternative basis for allowing sentencing under both 2F1.1(b)(2) and 3B1.1 in addition to saying flatly that it directly disagreed with the Romano court.

Indeed, I think it's also worth noting that the Sixth Circuit, the circuit that produced Romano, has relied on this ground for permitting sentencing under both 2F1.1(b)(2) and 3B1.1. See United States versus Aideyan, A-i-d-e-y-a-b, ll F.2d 74 at 76, Sixth Circuit, 1993.

Therefore, I think it's probably accurate to say that no circuit, including the Sixth, has taken the position that the District Court cannot sentence under the two provisions if the more than one victim portion of 2F1.1(b)(2) is the stated basis for the upward departure.

In all events, I think that it does not amount to impermissible double counting. I think the Probation Department got it right, and that there can be an adjustment for orle in the offense under 3B1.1 at the same time that there is an adjustment for more than minimal planning. So the contention is rejected. At least those are my reasons for rejecting it.

Having said that, we still have a question as to beyond the legal proposition of whether or not one can be adjusted upward on both grounds, whether it's appropriate here. So why don't you go right to that issue.

(Trial Transcript, 8-12).

APPENDIX E

§1B1.11. *Use of Guidelines Manual in Effect on Date of Sentencing* (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (l) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

APPENDIX F

§2F1.1 Fraud and Deceit

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(l) If the loss exceeded $2,000, increase the offense level as follows:

Loss	*Increase in Level*
(A) 2,000 or less	no increase
(B) $2,001-$5,000	add 1
(C) $5,001-$10,000	add 2
(D) $10,001-$20,000	add 3
(E) $20,001-$50,000	add 4
(F) $50,001-$100,000	add 5
(G) $100,001-$200,000	add 6
(H) $200,001-$500,000	add 7
(I) $500,001-$1,000,000	add 8
(J) $1,000,001-$2,000,000	add 9
(K) $2,000,001-$5,000,000	add 10
(L) over $5,000,000	add 11

(2) If the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any judicial or administrative order, injunction, decree or process; increase by 2 levels, but if the result is less than level 10, increase to level 10.

(3) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

APPENDIX G

§2F1.1 Fraud and Deceit

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(l) If the loss exceeded $2,000, increase the offense level as follows:

	Loss (Apply the Greatest)	*Increase in Level*
(A)	2,000 or less	no increase
(B)	More than $2,000	add 1
(C)	More than $5,000	add 2
(D)	More than $10,000	add 3
(E)	More than $20,000	add 4
(F)	More than $40,000	add 5
(G)	More than $70,000	add 6
(H)	More than $120,000	add 7
(I)	More than $200,000	add 8
(J)	More than $350,000	add 9
(K)	More than $500,000	add 10
(L)	More than $800,000	add 11
(M)	More than $1,500,000	add 12
(N)	More than $2,500,000	add 13
(O)	More than $5,000,000	add 14
(P)	More than $10,000,000	add 15
(Q)	More than $20,000,000	add 16
(R)	More than $40,000,000	add 17
(S)	More than $80,000,000	add 18.

(2) If the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting level is less than level 13, increase to level 13.

(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

(6) If the offense --

(A) substantially jeopardized the safety of soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

APPENDIX H

§3B1.1 *Aggravating Role*

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, incrase by 4 levels;

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 94-4748

UNITED STATES OF AMERICA,	:
Appellee,	:
V.	:
AARIF DAHOD,	:
Appellant.	:

PETITION FOR REHEARING

Appellant AARIF DAHOD, through undersigned counsel, pursuant to Rule 40, Fed.R.App.P., petitions this Court for rehearing of the Court's March 6, 1997 decision affirming Dahod's conviction and sentence.

I.

INTRODUCTION

Following oral argument, this Court, on March 6, 1997, issued its' opinion affirming Dahod's conviction and sentence. The Court likewise affirmed the conviction and sentence of co-defendant Logal while reversing the restitution order relating to deceased co-defendant Kuczek.

Dahod's Petition for Rehearing exclusively relates to sentencing issues raised concerning Dahod's one hundred-two month sentence. Dahod's Petition for Rehearing focuses upon two primary issues, to wit: the disparate application of Federal Sentencing Guidelines between Dahod and co-defendants; and, the sentencing court's violation of the *Ex Post Facto* clause of

the Constitution through application and use of more severe guidelines implemented *after* Dahod's alleged criminal activity had been completed.

Dahod submits that the sentencing court, in determining an offense level pursuant to §2F1.1 of the Sentencing Guidelines, was first required to determine an amount of loss and then determine, based upon that amount of loss, which the offense level applied to a defendant. Once that offense level was determined, the sentencing court could make adjustments as set forth in Chapter Three of the Sentencing Guidelines, as well as for other special offense characteristics. *See* §1B1.1 (Application Guidelines).

The offense level for §2F1.1 offenses is based upon the amount of loss suffered by the victim. It is therefore axiomatic that in determining the appropriate offense level defendants with the same "amount of loss" will have the same offense level (prior to consideration of any other special offense characteristics or Chapter Three adjustments). Not only was Dahod's (pre-adjustment) offense level not the same as co-defendants, with the same or similar amounts of loss, but more tragically, Dahod's offense level was higher than co-defendants with a *higher* amount of loss! The disparate application of the §2F1.1 offense levels between co-defendants should benefit from the close scrutiny of this Court. Dahod submits that the obvious disparity contradicts the intent of the Sentencing Guidelines and this Court's restriction against disparity of sentences. Rehearing would allow an unambiguous infirmity to be cured.

Dahod also submits that close scrutiny of this Court is required to review the sentencing court's actual application of amended sentencing guidelines (§2F1.1) which provided a more harsh sentence to Dahod. Although this Court concluded in its' March 6, 1997 opinion to follow other circuits which

have found the use of subsequent guidelines not to violate *ex post facto* provision of the Constitution, Dahod submits that the actual application of subsequent guidelines in Dahod's case far exceeded the methodology and use found to satisfy *ex post facto* concerns.

Accordingly, when the actual use of the subsequent guidelines are reviewed, that application constitutes a violation of the Ex Post Facto clause.

II.

THE SENTENCING COURT'S IMPLEMENTATION OF THE SENTENCING GUIDELINES WAS IMPROPERLY DISPARATE BETWEEN CO-DEFENDANTS

Dahod submits that one of the most significant sentencing errors related to the unambiguous disparity in the sentence calculations between co-defendants. The court in its' March 6, 1997 opinion did not specifically discuss this issue, however, Dahod submits that the sentencing court's error should be addressed. In order to facilitate this Court's review, Dahod will attempt to narrow and focus the legal issue.

Section 2F1.1 of the Sentencing Guidelines clearly requires that a sentencing court first make a factual finding concerning the "amount of loss" from the fraud. A sentencing court, based upon the amount of loss, then determines which offense level should be applied. Subsequent to that determination, other adjustments based upon special offense characteristics and Chapter Three of the Sentencing Guidelines matters may be made.

It is axiomatic that calculation of co-defendants offense levels in the same fraud should result in the same adjusted offense level if the amount of loss is determined to be the same as the co-defendants amount of loss (prior to the

aforementioned adjustments). Unfortunately, Dahod's sentence was constructed with an offense level *higher* than the offense level of co-defendants who had been found to have either the same or in certain cases larger "amounts of loss" than Dahod!

Dahod submits that the Sentencing Guidelines preclude the sentencing court from arriving at and implementing disparate application of "fraud" offense levels where the "amount of the loss" is the same. Simply stated, where the amount of loss in a fraud case is the same, the offense level based upon that loss must be the same. Unfortunately, the trial court failed to similarly apple the offense levels.

Dahod has fully set forth the scope of the disparity between the particular co-defendants in his briefs to this Court. Dahod submits that the disparity application in fact is precisely the type of improper guideline application previously cited by this Court. *See United States v. Alpert*, 989 F.2d 454, 459 (11th Cir. 1992); *United States v. Chotas*, 968 F.2d 1193 (11th Cir. 1992).

III.

THE TRIAL COURT'S SENTENCE VIOLATED THE EX POST FACTO CLAUSE

The Court's opinion specifically discussed whether the trial court's use of sentencing guidelines not in existence at the time of the offense which provided a more severe punishment than the guidelines in affect at the time of the offense, violated the *ex post facto* clause of the Constitution. The Court's opinion correctly cited the split among the circuits which have previously addressed the *ex post facto* issue. The Court rejected the rationale of the Ninth Circuit as set forth in *United States v. Canon*, 66 F.3d 1073, 1081 (9th Cir. 1995), that a sentence based upon a sentencing guideline provision adopted

after the date of the crime which increased a defendant's punishment violated the *ex post facto* clause.

> The "words and intent" of the Ex Post Facto Clause encompass "[e] very law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed." *Calder v. Bull*, 3 U.S. (3 Dall) 386, 390, 1 L.Ed. 648 (1798)(opinion of Chase, J.).

United States v. Canon, 66 F.3d at 1081.

Dahod obviously submits that the *Canon* (Ninth Circuit) analysis should be relied upon in this case of apparent first impression in this circuit. Nevertheless, the Court's opinion rejected *Canon* and instead relied upon a body of other cases from other judicial circuits which permitted the "use" of subsequent, more severe sentencing guidelines so long as the new guidelines were "used" as a "benchmark" or "analogue".

Unfortunately, no guideline has been provided to the sentencing court or to a reviewing appellate court to identify the difference between directly applying a new, more severe guideline provision and merely utilizing the provision as a yardstick, benchmark or analogy.

Although a sentencing court may state that a new, more severe sentencing guideline is only being used as a "yardstick" or a "benchmark", that label is practically and functionally a fiction when the sentencing imposed is precisely the sentence that would be imposed had the "yardstick" guideline been in effect.

Dahod's sentence provides a graphic illustration of mislabelling actual application of new, more severe sentencing guidelines as "benchmark" or "analogue".

The relevant sentencing guideline §2F1.1 provides for a base offense level of "6" with specific offense level increases based upon "amount of loss". The maximum amount of loss provided by §2F1.1 is in "excess of five million dollars", which allows an eleven offense level increase.

Thus, an individual sentenced pursuant to these sentencing guidelines should receive an adjusted offense level of seventeen (base offense six *plus* specific offense eleven level increase). A sentencing court, pursuant to "Commentary 10" to §2F1.1, could depart above the eleven point specific offense level increase if the loss substantially exceeded the $5 million loss. The new sentencing guidelines provide for specific offense levels *increases* for losses in excess of $5 million. Specifically, the new guidelines provide *three* additional levels above the five million dollar offense level for loss that include the $59 million amount assigned to Dahod.

Accordingly, if the new sentencing guideline would actually be used as an analogue, the sentencing court would add three levels to the existing adjusted offense level establishing an adjusted offense level of twenty, (base offense level of six, *plus* three level increase analogous to the three level increase above the $5 million level).

However, instead of utilizing the new sentencing guideline as an analogue, the sentencing court looked to what a $59 million loss would be with the amended §2F1.1. The sentencing court then applied that level which was a seventeen specific offense level increase and determined an amended offense level of "23".

The root of the sentencing court's error was failing to recognize that the amended sentencing guideline *increased* the offense level for all losses above $100,000. Therefore, instead of recognizing increases in the existing guidelines which,

because of the Ex Post Facto clause, should have been discounted, the trial court sentenced Dahod directly based upon those increases. Comparison of §2F1.1 in the applicable and amended guideline reveal the three level disparity.

	LOSS	EXISTING GUIDLINE LEVEL INCREASE	AMENDED GUIDELINE LEVEL INCREASE
(L)	Over $5,000,00	Add 11	Add 14

Actually utilizing the amended sentencing guideline as an analogue would result in Dahod's offense level being a level "20" instead of the level "23" determined by the court. The level "23" reflects a direct application of the new sentencing guideline and a violation of the *Ex Post Facto* clause of the Constitution.

WHEREFORE, Appellant Dahod requests that his Petition for Rehearing be granted.

Respectfully submitted,

BRUCE A. ZIMET, P.A.
Attorney for Appellant Dahod
One Financial Plaza, #2612
Ft. Lauderdale, FL 33394
Ft. Lauderdale: 954-764-7081)
(Miami: 305-948-3648)

BRUCE A. ZIMET, ESQUIRE
Florida Bar #225053

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the forgoing have been mailed this 26th day of March, 1997 to Anne Schultz, Esquire, Assistant United States Attorneys, 99 N.E. Fourth Street, Miami, Florida 33132, Clark D. Mervis, Esquire, Attorney for Appellant Logal, 2937 S.W. 27th Avenue, Suite 202, Miami, Florida 33133 and Roy Black, Esquire, Attorney for Appellant John Kuczek, 201 South Biscayne Boulevard, Suite 1300, Miami, Florida 33131.

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BRUCE A. ZIMET, ESQUIRE